No. 76-100

In the Supreme Court of the United States

OCTOBER TERM, 1976

SOUTHERN RAILWAY COMPANY, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 539 F. 2d 335. The decision of the Occupational Safety and Health Review Commission (Pet. App. 35a-36a) is reported at 13 OSAHRC 498. The decision and order of the Commission's Administrative Law Judge (Pet. App. 15a-34a) is reported at 13 OSAHRC 499.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1976, and a petition for rehearing and suggestion of rehearing *en banc* was denied on March 15, 1976 (Pet. App. 12a). Petitioner's motion for reconsideration of the denial of rehearing was denied on June 23, 1976. On June 7, 1976, the Chief Justice extended the

time within which to file a petition for a writ of certiorari to and including August 12, 1976, and the petition was filed on July 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 653(b)(1), exempts the railroad industry from compliance with the safety and health regulations promulgated under the Act merely because another federal agency has issued some safety and health rules affecting that industry.

STATEMENT

1. The Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions * * *." 29 U.S.C. 651. See generally *Brennan* v. *Gilles & Cotting, Inc.*; 504 F. 2d 1255, 1259 (C.A. 4); *National Realty and Construction Co.* v. *Occupational Safety and Health Review Commission*, 489 F. 2d 1257, 1260-1261 (C.A. D.C.). The Act imposes upon all employers engaged in a business affecting interstate commerce the obligation to furnish "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" and to "comply with occupational safety and health standards promulgated under this Act." 29 U.S.C. 654(a)(1) and (2). The sole exception to this comprehensive regulatory scheme is Section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1), which provides:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

2. Petitioner Southern Railway Company operates an interstate railroad system, including a facility in Spartanburg, South Carolina, known as the "Hayne Shop," which is used for maintenance and repair of rolling stock (Pet. App. 2a, 20a). On November 2, 1973, after a compliance officer of the Occupational Safety and Health Admininstration of the Department of Labor had inspected this facility, the Secretary cited petitioner for ten nonserious violations of safety and health regulations promulgated under the Act and proposed small penalties and general abatement of the violations by April 1974 (Pet. App. 2a, 16a-18a).[1] At the time of these citations and the subsequent Commission decision the Federal Railroad Administration of the Department of Transportation (FRA) possessed statutory authority to regulate at least some of the conditions affecting employee safety at

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[1]Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2), provides that every employer affecting commerce "shall comply with occupational safety and health standards promulgated under this Act." A serious violation is defined as one where "there is a substantial probability that death or serious physical harm could result * * * unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S. C. 666(j). A nonserious violation is defined as one that is not serious. 29 U.S.C. 666(c). Petitioner was cited under several standards for failing to furnish explosion-proof lighting in the Hayne Shop's spray-painting area, failing to protect its employees from excessive levels of iron-oxide fumes, failing to protect its workers from welding rays by use of flameproof screens or goggles, permitting widespread use of unsafe ladders and scaffolding, and failing to comply with various industrial sanitation requirements (Pet. App. 16a-18a, 21a-22a).

the Hayne Shop.[2] It had not exercised that authority, however, and no substantive occupational safety and health regulations of FRA or any other agency of the Department of Transportation applied there (Pet. App. 3a, 23a, 27a, 40a).

Petitioner timely contested the citations, admitting noncompliance with the cited standards but asserting that, because FRA had historically regulated some aspects of employee safety in the railroad industry under a variety of statutes, the entire industry was exempt from regulation under the Act pursuant to Section 4 (b)(1) (Pet. App. 23a, 35a). An administrative law judge of the Occupational Safety and Health Review Commission rejected this contention, concluding that, in view of its expressed desire for uniform nationwide safety protection so far as possible, Congress could not have "intended to exempt industries which are regulated by other Federal agencies even if [those agencies] did not afford protection to employees within the industry" (Pet. App. 26a-27a). The Review Commission summarily affirmed in reliance upon its earlier decision in *Southern Pacific Transportation Company*, 13 OSAHRC 258 (Pet. App. 37a-52a), affirmed *sub nom. Southern Pacific Transportation Co.* v. *Usery*, 539 F. 2d 387 (C.A. 5), which had similarly rejected a claim of industry-wide exemption for the railroad industry in light of the Act's purpose and legislative history (Pet. App. 40a-41a).

The court of appeals unanimously upheld the Commission's decision, holding that the Section 4(b)(1) exemption "applies only when another Federal agency has actually exercised its statutory authority" and "does not

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[2]See Section 202(a) of the Federal Railroad Safety Act of 1970, 84 Stat. 971, 45 U.S.C. 431(a) (Pet. 3). But see Pet. App. 24a-25a and nn. 4-5.

apply where such an agency has regulatory authority but has failed to exercise it" (Pet. App. 4a). The court observed that earlier versions of the Act, providing that the mere existence of statutory authority in another agency was sufficient to invoke the exemption, had been rejected by Congress (Pet. App. 4a) and concluded that "a fair reading of the exemptive provision in the light of the statutory objectives requires that the Commission's construction of the statute be affirmed" (Pet. App. 7a-8a, footnote omitted):

> [T]he industry-wide exemption urged upon us by Southern would fly in the face of these principles and objectives. The safety regulations of the Department of Transportation are confined almost exclusively to those areas of the railway industry which affect over-the-road operations such as locomotives, rolling stock, signal installations, road beds and related facilities. While the regulatory program in these areas reflects a concern for the safety of the employees, it is directed primarily toward the general safety of transportation operations. On the other hand, the Department of Transportation and FRA do not purport to regulate the occupational health and safety aspects of railroad offices or shop and repair facilities. To read the exemptive statute in a manner which would leave thousands of workers in these nonoperational areas of the railway industry exposed to unregulated industry hazards would, in our opinion, utterly frustrate the legislative purpose.

In response to petitioner's contention that this result would extend "the Secretary's jurisdiction * * * into every minute detail of the working environment not covered by a specific standard or regulation of the other Federal agency", the court, relying upon *Corning Glass*

Works v. *Brennan*, 417 U.S. 188, noted in *dictum* that a middle ground based on the "hazards" and "surroundings" implicit in the statutory term "working conditions" was available (Pet. App. 8a-10a, footnote omitted):

> We think this aggregate of "surroundings" and "hazards" contemplates an area broader in its contours that the "particular, discrete hazards" advanced by the Secretary but something less than the employment relationship in its entirety advocated by Southern. The Act was intended both to provide comprehensive coverage to the workers across the country and to avoid duplication of regulatory effort by the various Federal agencies. In light of these dual objectives * * * we are of the opinion that the term "working conditions" as used in Section 4(b)(1) means the environmental area in which an employee customarily goes about his daily tasks. We are further of the opinion that when an agency has exercised its statutory authority to prescribe standards affecting occupational safety or health for such an area, the authority of the Secretary of Labor in that area is foreclosed. Such a construction, we think, avoids the confusion and duplication of effort that Section 4(b)(1) of the Act was designed to prevent and is consonant with the general statutory purpose.

Finally, the court rejected petitioner's claim that an advance notice of proposed rulemaking, which had been published by FRA four months after the Commission's decision and which invited comment on the agency's intent to propose more comprehensive safety rules,[3] was an "exercise" of authority sufficient to exempt

[3]40 Fed. Reg. 10693.

petitioner under Section 4(b)(1), concluding that "denial of OSHA's protection to numerous workers upon the basis of this speculative announcement would be inappropriate" (Pet. App. 10a-11a).[4]

ARGUMENT

1. Petitioner's principal contention (Pet. 4-5, 7, 8-13) is that Section 4(b)(1) of the Occupational Safety and Health Act, 29 U.S.C. 653(b)(1), exempts the railroad industry from any regulation under the Act because another federal agency (the Federal Railroad Administration) has authority to regulate job-related hazards in that industry. The court of appeals correctly rejected this result, since it is contrary to the legislative design of the Act and would leave a gaping hole in the statutory protection from workplace health and safety hazards that Congress sought to ensure for the nation's employees. Furthermore, the decision below is consistent with the only other appellate ruling on the scope of Section 4(b)(1) as applied to the railroad industry (*Southern Pacific Transportation Co.* v. *Usery, supra*, 539 F. 2d 387)[5] and is in accord with this Court's repeated prounce-

[4]On March 15, 1976, the court of appeals denied a petition for rehearing and suggestion of rehearing *en banc* whose sole new claim was that, subsequent to oral argument, FRA had proposed rules regulating a single hazard at the Hayne Shop that was not at issue in this case (Pet. App. 12a). See 40 Fed. Reg. 30495-30497 ("blue signal" rule). Petitioner's motion for reconsideration of the denial of rehearing, alleging that FRA had subsequently issued an identical final rule, was denied on June 23, 1976 (Pet. App. 13a).

[5]See also *Organized Migrants in Community Action* v. *Brennan*, 520 F. 2d 1161, 1166 (C.A. D.C.), where the court considered it "clear on its face" that Section 4(b)(1) does not exempt entire industries and that withdrawal of the Secretary's jurisdiction to enforce safety and health standards for particular working conditions is dependent upon the actual exercise of statutory authority over those conditions by another federal agency.

ments that exemptions from remedial legislation must be narrowly construed (see, *e.g.*, *Peyton* v. *Rowe*, 391 U.S. 54, 65; *Phillips Company* v. *Walling*, 324 U.S. 490, 493), and that the interpretation given a statute by the agency charged with its administration is entitled to great deference (see, *e.g.*, *National Labor Relations Board* v. *Boeing Co.*, 412 U.S. 67, 74-75; *Udall* v. *Tallman*, 380 U.S. 1, 16).[6]

While the court of appeals neither resolved every potential issue under Section 4(b)(1), nor defined its "environmental area" *dictum* with the precision necessary to preclude all future controversies under that provision, its holding that Section 4(b)(1) does not exempt every facet of the railroad industry from regulation under the Act is unquestionably correct and does not warrant review. Indeed, the inappropriateness of further review in the absence of a conflict among the lower courts is confirmed by the fact that the issue of the scope of Section 4(b)(1) as applied to the railroad industry is

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[6]The colloquy between Representatives Perkins, Daniels and Erlenborn (Pet. 9-11) does not require a different result. As the court of appeals (Pet. App. 4a-5a and n. 8) and the Commission (Pet. App. 39a and n. 6) indicated, that discussion concerned an earlier House version of Section 4(b)(1) that arguably would have exempted entire industries by divesting the Secretary of authority over "working conditions of employees with respect to *whom* any Federal agency * * * exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." Leg. Hist. 843, 876, 1109 (emphasis added). ("Leg. Hist." refers to the one-volume Committee print entitled Legislative History of the Occupational Safety and Health Act of 1970, Senate Subcommittee of the Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (1971). The House version was rejected in favor of the present Senate language by a Conference Committee chaired by Representative Perkins, who characterized the change as one of several resolved "a major difference in the two bills in the treatment of the proposed effect on other preexisting health and safety statutes." Leg. Hist. 1204. See also *id.* at 1185-1186.

presently pending before several other courts of appeals (see Pet. 6-7, n. 2). Continued litigation in the lower courts may well elucidate the proper contours of the statutory exemption. The Fifth Circuit, for example, has recently provided additional guidance on this question of statutory construction by suggesting that the operation of the exemption should depend in part upon the manner in which the sister federal agency articulates its regulatory aims. See *Southern Pacific Transportation Co.* v. *Usery*, *supra*, 539 F. 2d at 392.

2. Petitioner contends (Pet. 12-14) that, even under the court of appeals' "environmental area" test, FRA has sufficiently exercised its authority over the Hayne Shop to bar regulation by the Secretary under the Act. Specifically, petitioner relies upon the agency's issuance of record-keeping and employee testing requirements for the railroad industry. But, even if it is assumed that those requirements "affect occupational safety or health," within the meaning of Section 4(b)(1), they do not purport to deal with the types of working conditions that were the subjects of the citations and were therefore correctly disregarded by the court of appeals in determining whether there had been a sufficient exercise of FRA regulatory authority to exempt the railroad industry from the Act. Similarly, the court properly concluded that FRA's advance notice of proposed rulemaking did not exempt railroad employees from the protection of the Act, because it appeared that the areas of the railway industry covered by FRA regulation would not be extended by the proposed rule (Pet. App. 10a-11a). Moreover, the court correctly refused to give weight to FRA's invitation for comment as to the areas of the industry that its regulations should cover, noting that "the denial of OSHA's protection to numerous workers upon the basis of this speculative announcement would be inappropriate" (*id.* at 11a). Indeed, only by ignoring the legislative purpose of the Act in general and of Section 4(b)(1) in particular could petitioner's interpretation of the exemption

provision be accepted. See *Southern Pacific Transportation Co.* v. *Usery, supra,* 539 F. 2d at 392-393.

More importantly, however, as the court noted in its denial of petitioner's motion for reconsideration (Pet. App. 13a), the issue before it was the Secretary's "regulatory powers at the time of the violation[s] in this case," not the effect of subsequent FRA actions on which the Commission had no opportunity to pass. At the time of the court and Commission decision, FRA admittedly had not issued any regulations affecting working conditions of the types that were the subject of the citations. Thus, the question of the effect of an advance notice of rulemaking is not presented here.[7]

3. Petitioner claims (Pet. 15-18) that the court of appeals erred by refusing to remand the case to the Commission for consideration of the changed circumstances caused by FRA's proposed rulemaking. For the reasons previously stated, however, FRA's advance notices and notices of rulemaking did not affect the Commission's authority. In any event, under the statutory scheme a remand to the Commission will effectively occur by operation of law. As petitioner recognizes (Pet. 16), the Commission's abatement order, which was affirmed by the court of appeals, may be enforced only by subsequent reinspection and issuance of nonabatement notices, which may be contested before the Commission like any other citation or proposed penalty. 29 U.S.C. 659(b) and (c), 666(d); cf. *Dan J. Sheehan Company* v. *Occupational Safety and Health Review Commission,* 520 F. 2d 1036, 1042 and n. 4 (C.A. 5), certiorari

[7]Representative Steiger's statement that sister-agency "action * * * at the formative stage of regulations or enforcement" would trigger Section 4(b)(1) (Pet. 13-14) is accordingly irrelevant to this case. Moreover, that remark was addressed to the House version of Section 4(b)(1), which was ultimately rejected. See n. 6, *supra;* Leg. Hist. 997.

denied, 424 U.S. 965. If reinspection is conducted and results in a nonabatement notice because petitioner has failed to correct the instant violations, the Commission will have ample opportunity to evaluate petitioner's claim that it no longer has any duty to comply with the Act.[8] A remand by the court of appeals without deciding the legal issue presented would have added substantial delay to the resolution of this case.

[8]Contrary to petitioner's suggestion (Pet. 18), this course involves no real possibility of the financial hardship now advanced for the first time. The Commission stayed its abatement order pending the decision below, and the court of appeals stayed its mandate pending the disposition of this petition (Pet. 16). Thus the six-month abatement period ordered by the Commission will begin to run only after the petition is denied. Moreover, even if petitioner were cited for a failure to abate after this period expired, the possible penalties it could receive for these non-serious violations are relatively minor under statutory and Departmental guidelines, see 29 U.S.C. 666(i), and would be vacated entirely if petitioner's argument concerning the effect of these or further FRA actions were to prevail.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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